

## Introduction

I am a consumer and privacy advocate located within the state of Indiana and wish to express my support for the establishment of a national Do Not Call (DNC) list. I have spent a considerable amount of time devoted to this issue, logging all telemarketing calls I have received for the past two years and taking action against those that violate the provisions of the TCPA. I have referred to these logs in my comments below, in order to help you to better gauge the extent of the problems involved.

While the DNC rules within the FCC regulations and Telephone Consumers Protection Act (TCPA) have helped to some degree in alleviating the number of calls I now receive, my experience and records show that it is routinely ignored, and that companies are increasingly resorting to subtle evasions and inventions to get around the laws provisions. Along with the establishment of a national DNC registry it is my hope that the FCC investigates and clarifies other aspects of the law, including, but not limited to; the exemption for non-profit corporations in making pre recorded solicitations, non profit exemptions for professional telemarketers, exemptions for companies making calls that do not include a solicitation, current practices involved with company specific DNC lists, the meaning and significance of "established business relationships", clarification of those responsible for the call, and the operation and use of predictive dialers.

### 1) The establishment of a national DNC registry

While industry representatives are quick to state that the regulations of the FTC Telephone Sales Rule (TSR) and those of the TCPA are adequate to control the industry, the proliferation of state DNC lists within the past 5 years and the high participation rate in those programs show that consumers are in need of further ways to stop intrusive telemarketing calls. Studies, such as one conducted in 1999 for the State of Vermont (1), show that the vast majority of consumers do not wish to receive any telemarketing calls at all.

While state DNC programs may be effective for people that live within those states, a large portion of the American public does not have access to such a list and will not for the foreseeable future. Many of these programs are also riddled with exemptions for special interests, despite the fact that the majority of people who enroll in these programs wish to receive no telemarketing calls at all. Some states also require a payment to be placed on the list, which, while being modest in nature, sets a dangerous precedent of requiring people to pay to protect their own privacy.

A national DNC registry can help to alleviate the problems noted above. Residents within states that do not have a DNC program will obtain some measure of protection from the calls, and residents within states that already have DNC programs with numerous exemptions will gain greater protections from the intrusions. For those that can not afford the minor cost or have philosophical objections to paying anything, no matter how trivial, to retain privacy within their own home, a federal DNC list that follows the Congressional mandate stipulating consumers should bear no cost for such a program would also grant relief.

In establishing such a registry the FCC should follow the guidelines within other areas of the TCPA that allow states with more restrictive laws to retain those provisions. The residents of many states that have existing DNC laws,

such as Indiana, are quite satisfied with they way they function. It is important to consider these laws when enacting a national DNC registry in order to ensure that the residents within these states do not find their protections from unwanted intrusions being reduced, instead of enhanced, by a national program.

## 2) Exemptions for pre recorded solicitations from "non-profit" entities

One of the greatest increases in calls I have been receiving has been in the area of pre-recorded solicitations purporting to be on behalf of a non-profit entity. Within the past two years I have received a significant number of these calls, frequently from the same companies, and most often offering various forms of debt reduction services. My investigation has shown these to be for profit corporations that are hiding behind the shield of a non-profit in order to use telemarketing methods that would otherwise be prohibited, and in some cases "adopting" that non-profit to do their telemarketing for them.

While it is my understanding that the FCC has and will continue to investigate this practice and that the claimed exemption for this behavior is not valid, this section of the law is in need of further clarification. If a corporation is profiting from a business activity directly involved with the telemarketing call, other than receiving a portion of charitable funds donated, the exemption should be invalid.

## 3) Charity solicitations

Further compounding the problem with charitable exemptions are for-profit telemarketing firms calling on behalf of non-profit charities. My own logs show 13 such calls over the past 18 months, many of them from organizations who I have repeatedly asked to place me on their DNC list. While these companies may be operating within the scope of current laws, they often retain the largest portion of the money donated, and consumers who are aware of this practice are reluctant to support such efforts (2) (3). The current language of the regulations implementing the TCPA offers no relief to consumers who object to this practice and would prefer to receive no calls of this nature.

One solution to this problem is to mirror language within the Indiana DNC law that regulates this practice. Rather than having a blanket exemption for 503-C corporations and anyone calling on their behalf, this law stipulates that only calls from direct employees or volunteers of the 503-C corporation are exempt, unless the party being called has a pre-established relationship with the charity. This still allows a charity to spread their message, a viable concern as outlined in various Supreme Court Cases (4), while giving them ample opportunity to raise the funds they need and giving consumers some relief from calls of this nature.

At the very least, FCC regulations should be amended to require companies that solicit on behalf of charities to maintain DNC lists, allowing people who have no intention of ever giving money to a charity through the telephone to avoid these unwanted calls. It is well established case law that citizens have a right to privacy within their own home and that an organizations 1st Amendment rights to free speech do not trump a residents right to privacy (5). I urge the FCC to consider the rights of residents in maintaining privacy within their own home and adopt regulations that restrict unwanted charitable solicitations.

#### 4) Exemptions for calls where no solicitation is given

Another trend that appears to be increasing in frequency is that where the caller attempts to use the exemption for calls where no solicitation is given, most often through the wording of a "survey". One recent call I am aware of asked the recipient a three part "survey" to inquire if he "knew about how refinancing works with no up-front costs and if he would take advantage of such a loan if offered." Other parties have used similar tactics where the "survey" asked only the 4 qualifying questions needed to ascertain if the subject was a candidate for timeshare ownership, or used a phrase such as "If you think a week in Florida for \$99 sounds like a good deal press #1 now" in an attempt to avoid TCPA regulations.

If this situation is allowed to continue then marketers will soon switch to using the form of a question to state that their call was only a "survey". Aluminum siding companies will ask, "Do you think your house would look better with new siding?" Banks will "survey" potential customers to ask if they would prefer to pay a lower interest rate on their credit cards. Security firms will "survey" homes to determine if people feel safe within them.

While this ruse is unlikely to hold up in a court of law and the Supreme Court has struck down attempted evasions of a similar nature (6), companies appear to be turning towards it with increasing frequency. This issue needs to be clarified to state that a "survey" which does nothing but qualify a candidate for the offer is not exempt.

#### 5) Problems within existing company specific DNC requirements

By repeatedly availing myself of the opportunity to have my telephone number placed on company specific DNC lists I have managed to reduce the amount of calls I receive to a manageable level from the upwards of 20 calls per day I was receiving 3 years ago. However, I have experienced extensive problems with compliance in various facets of this portion of the regulations.

Not including exempt calls such as charities or other violations such as pre recorded solicitations, 41% of the callers with whom I asked for DNC list placement failed to honor the request and called a second time, 12% called two or more times after my initial request. Companies fare even worse with regards to complying with the regulations that require them to furnish a copy of their DNC policy upon demand and 87% of my requests were either met with a statement they had no such policy or they failed to send me one as is required. Companies also frequently state that it will take as long as 60 days to add a consumers name to their DNC list, and that they may receive additional telemarketing calls in the meantime.

Both of these practices are unacceptable and need to be addressed. Companies are able to remove purchasers from calling lists instantly so that they do not risk angering them with subsequent calls, there is no reason, nor excuse, why a DNC request cannot be registered immediately, or at the very least within 24 hours. There is a large infrastructure in place that allows for instantaneous communications throughout the nation and the world; a 60-day "grace period" for compliance is unacceptable.

Companies that rely on telemarketing appear to need further incentives in complying with these aspects of the law. The TCPA has been in place for over a

decade and any company that utilizes telemarketing has had more than an adequate amount of time to compile a DNC policy and adhere to it. If companies are having problems with compliance due to the failure of employees to properly follow the policy then companies need to adjust their methods of operation. I urge to the FCC to step up enforcement action in this area and put companies on notice that non-compliance will no longer be tolerated.

#### 6) Established business relationships

The current regulations make allowances for an existing business relationship, and the footnotes of the 1992 Memorandum and Opinion Order Implementing the TCPA state that consumers may sever that relationship, for purposes of future solicitations. Some companies are using that exemption to continue soliciting customers, regardless of previous requests that they receive no further calls. A pre-existing relationship should not bear with it the requirement that you must submit to as much advertising as a company wishes to present to you.

I urge the FCC to clarify that regardless of a consumer's current relationship with a company, the right to be free of obtrusive phone calls is absolute and no exemption remains once a consumer has asked to receive no further calls, regardless if they remain a customer of the company.

#### 7) Responsible party

Another recent trend in telemarketing, especially regarding pre-recorded solicitations, is the use of a call center switchboard to screen calls and protect the client from potential ramifications of the calls. By using this method, callers are unaware of the identity of the organization that the call was made on behalf of, and in most circumstances these companies are evasive about revealing their identity.

The opinion orders have established that the entity that ultimately benefits from the call is the one responsible, but it is becoming increasingly difficult to identify who that party is. Companies that are both placing the calls as well as screening them are attempting to evade prosecution for both their clients and themselves, by shielding the client and by their own claim that they are not the primary benefactor.

I suggest the FCC consider revising or clarifying the rules to state that any company that materially participates in a telemarketing campaign in violation of the rules proscribed within the TCPA, and who can not be considered a common carrier, is equally liable for those actions.

#### 8) The use of predictive dialers

One of the larger problems complicating the frustration of consumers is the expanding use of predictive dialers by the industry, with their resulting "abandonment" of calls. 38% of the calls I have logged in the past 8 months resulted in no operator on the line; in all likelihood the vast majority of those were telemarketing calls where I had been "abandoned". While industry guidelines suggest an abandonment rate of "no greater than 5% and as close to - 0- as possible", my experience suggests this is widely ignored. Even at 5%, 1 out of every 20 calls is needlessly disturbing someone within their own home. This issue is not merely one of annoyance; there are other social aspects to

consider. Upon receiving these calls the elderly often fear a friend or relative has attempted to call them as they fell ill and inundate 911 lines with calls of concern. People that have had trouble with stalkers and battered women fear their nemesis is on the other end of the call harassing them. People in troubled relationships fear the call is from their significant others new found "friend" that has hung up due to their answering.

Industry representatives state that an abandonment rate set to zero would render the machines useless, however I fail to find the logic in that statement. With the abandonment rate set to zero the machines would still be able to make calls by using its algorithms to analyze call duration lengths and telephone subscriber answer rates and provide customers based on that criteria. It will undoubtedly result in a minor increase in "down" time for operators, and will still result in an occasional "abandoned" call. What it will not do is purposely call more people than it knows it can handle, with the resulting unwarranted disruption in the lives of residents.

The industry wants to operate at 100% efficiency and seemingly has no concern that by doing so they are needlessly disrupting countless people every day. I ask that the FCC investigate this matter and require these companies to set an abandonment rate that does not intentionally disturb others. To set a rate other than zero would be the equivalent of sanctioning the unnecessary disturbance of residents within their homes.

## Conclusion

Telemarketing calls are disruptive in their own right, compounding that is the frequent abusive manner with which telemarketers treat their prospective clients. I attempt to use complete civility in every call I receive, an attitude that has not been returned on many occasions. I have been sworn at, been told or implied that I am a 'bad' person because I did not avail myself of whatever it was they were marketing, hung up on, and have had occasions where sales people continually restarted reading their sales script upon each of my numerous requests to be placed on their DNC list. Being disturbed in your own home is bad enough, being abused after that disruption is unconscionable.

Existing laws are not working; the citizens of our country deserve a method to keep their home, their sanctuary, free from invasive and abusive intrusions. Please adopt a national DNC registry and change the existing regulations as appropriate in order to ensure that residents of this great country can continue to live in peace.

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## Footnotes:

1) March 1999 survey conducted by the State of Vermont Department of Public Service located at <http://www.state.vt.us/psd/telemarketingtabs.htm> that showed 87.9% of respondents desired to receive no telemarketing calls at all and of the remainder, 9.4% would like to receive fewer calls.

2) Active Charity Promotions in Kentucky; <http://www.law.state.ky.us/cp/active.htm> which shows the results of charitable fundraising campaigns in the state of Kentucky, including one company that had 22 campaigns and reported retaining 99% of the money raised in all but one.

3) Pennies for Charity, NY State Department of Law, Charities Bureau, <http://www.oag.state.ny.us/charities/pennies01/penintro.html> which tabulates the amount retained by the solicitation company, with the bottom tier, those that give 19% or less of the money to the charity they are calling on behalf of, raising \$72,656,378.05 of which the charities received \$8,866,981.70 dollars leaving \$63,789,396.35 as the solicitors profit.

4) See Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620; Secretary of State of Maryland v. J.H. Munson Co., 467 U.S. 947; Riley v. National Federation of the Blind, 487 U.S.781

5) See Frisby v. Schultz, 487 US 474; Carey v. Brown, 447 U.S 471; Rowan v. United States Post Office Department, 397 US 728

6) See Valentine v. Chrestensen, 316 U.S. 52